**PP**

**v.**

**NAZRI MOHD JUFRI & ANOR**

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CRIMINAL TRIALS NOS: 45-6-2004/45-7-2004]
10 JULY 2007

***CRIMINAL PROCEDURE:*** *Trial - Close of prosecution case - Duty of trial judge - Whether court must undertake a maximum evaluation of prosecution evidence - Court must assess credibility of prosecution witnesses - Court must draw inferences admitted by prosecution evidence - Criminal Procedure Code, s. 180*

***CRIMINAL LAW:*** *Penal Code - Section 34 - Common intention - Proof of - Prosecution to show pre-arranged plan to commit a criminal act - Crime must have been done in concert pursuant to that pre-arranged plan - Whether common intention can be inferred*

***CRIMINAL LAW:*** *Penal Code - Sections 302, 34 - Murder - Common intention - Whether proved - No evidence of common intention between accused and persons still at large - No inference of common intention could be inferred from facts and circumstances*

***EVIDENCE:*** *Witness - Credibility - Contradictions, discrepancies or demonstrable falsehoods in evidence of a witness - Whether sufficient reason for rejecting evidence - Court to treat evidence with suspicion and accept parts court considers as true - Court to completely disregard evidence where utterly unreliable - Murder - Discrepancies and inconsistencies in evidence so irreconcilable and ambivalent that rendered witness's credibility doubtful and highly questionable*

The accused were jointly charged and tried with three charges of murder punishable under s. 302 of the Penal Code (the Code) and read together with s. 34 of the same Code. The three charges against both the accused persons were brought in reliance on the common intention provisions of s. 34 jointly with other persons who were still at large. Lee Man Cheong (PW6) identified the 1st accused as the person who had stabbed Yau Wei Hong and Ah Tee. PW6 also identified the 2nd accused as the person stabbing Au Yoke Kong. PW6 was also injured in the fight and was warded in the hospital. In cross-examination however, PW6 admitted that he could not recall the description of the person who had stabbed Yau Wei Hong, Au Yoke Kong and Ah Tee since that incident had taken place a long time ago and he could not remember well. PW6 gave no explanation as to why that during

examination-in-chief he could identify both the accused persons as the two assailants. The prosecution relied a great deal on the testimony of PW6 to establish that the fatal injuries sustained by the three victims were as a result of the act of both the accused persons. He was the only eye-witness evidence at the scene of the incident against both the accused persons. Whilst the learned deputy public prosecutor conceded that there were discrepancies and inconsistencies in the evidence of PW6, he argued that those infirmities were natural and pointed in favour of PW6's truthfulness. The learned deputy urged the court to accept PW6 as a witness of truth claiming that the contradictions did not affect the reliability of PW6's evidence of identification. Therefore, the central question in this case was whether PW6 was a reliable and a witness of truth.

**Held (acquitting and discharging both the accused without calling upon them to enter their defence):**

**(1)** Under s. 180 of the CPC the court is required to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his defence and it involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. (para 8)

**(2)** Contradictions and discrepancies or even demonstrable falsehoods in the evidence of a witness are not sufficient reason for rejecting the whole of the evidence of such witness. The proper approach is to treat the evidence with suspicion and to treat it with caution and accept parts of the witness' evidence, which the court considers the evidence as true. On the other hand, if the court considers the evidence utterly unreliable it is to be disregarded completely. (para 9)

**(3)** As to the testimony of PW6, the discrepancies and inconsistencies were so irreconcilable and ambivalent that rendered his credibility doubtful and highly questionable. Even though his evidence could raise a suspicion that both the accused persons had inflicted the fatal injuries but suspicion alone cannot be the basis of a conviction. In the circumstances, the inference most favourable to both the accused must be adopted. (para 16)

**(4)** On a charge involving common intention, the prosecution has to show that there was a pre-arranged plan to commit a criminal act and the crime forming the subject of the charge was done in concert pursuant to that pre-arranged plan. Common intention can be inferred from the facts and circumstances of a particular case and from the conduct of the persons involved. In the present case, there

was no evidence adduced by the prosecution to prove that there existed a common intention between both the accused and the persons who were still at large to commit the crime of murder. Furthermore, no inference of common intention could be inferred from the facts and circumstances of the case. (para 18)

**Case(s) referred to:**
*Balachandran v. PP [2005] 1 CLJ 85 FC* ***(foll)***
*De Silva v. PP [1964] MLJ 81* ***(refd)***
*Khoon Chye Hin v. PP [1961] MLJ 105* ***(refd)***
*Mahbuh Shah v. King Emperor [1945] AIR PC 118* ***(refd)***
*Mohamed Alias v. PP [1983] 2 MLJ 173* ***(refd)***
*Mohamed Kasdi v. PP [1969] 1 MLJ 135* ***(refd)***
*Namasiyiam & Ors v. PP [1987] 2 MLJ 336* ***(refd)***
*Pie Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 HC* ***(refd)***
*PP v. Krishna Rao Gurumurthi & Ors [2000] 1 CLJ 446 HC* ***(refd)***
*PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(foll)***

**Legislation referred to:**
Criminal Procedure Code, s. 180(1)
Penal Code, ss. 34, 302

*For the 1st accused - Gobind Singh Deo; M/s Gobind Singh Deo & Co*
*For the 2nd accused - RK Menon; M/s RK Menon*
*For the PP - Ian Sheng Kuan Chou Chuen; DPP*

*Reported by Amutha Suppayah*

## JUDGMENT

**Azahar Mohamed J:**

**[1]** Nazri bin Mohd. Jufri (the 1st accused) and Koh Lim Leng (the 2nd accused) are jointly charged and tried before me with three charges of murder, which are offences punishable under s. 302 of the Penal Code (the Code) and read together with s. 34 of the same Code. The charges read as follows:

1. Bahawa kamu bersama-sama dan beberapa orang yang masih bebas pada 28.2.2003 antara jam 3.30 pagi dan jam 3.50 pagi bertempat di Long Kee Sea Food Restaurant, Jalan Dato' Abdullah Tahir, dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim, dalam memajukan niat bersama telah melakukan pembunuhan dengan menyebabkan kematian AU YOKE KONG, NO. K/P: 760702-08-5283 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun Keseksaan.

2. Bahawa kamu bersama-sama dan beberapa orang yang masih bebas pada 28.2.2003 antara jam 3.30 pagi dan jam 3.50 pagi bertempat di Long Kee Sea Food Restaurant, Jalan Dato' Abdullah Tahir, dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim, dalam memajukan niat bersama telah melakukan pembunuhan dengan menyebabkan kematian TAN LAY FATT, NO. K/P: 780914-01-5699 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun Keseksaan.

3. Bahawa kamu bersama-sama dan beberapa orang yang masih bebas pada 28.2.2003 antara jam 3.30 pagi dan jam 3.50 pagi bertempat di Long Kee Sea Food Restaurant, Jalan Dato' Abdullah Tahir, dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'zim, dalam memajukan niat bersama telah melakukan pembunuhan dengan menyebabkan kematian YAU WEI HONG, NO. K/P: 741007-08-5757 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun Keseksaan.

**[2]** The salient facts adduced by the prosecution can be summarized as follows. On 27 February 2003, Lee Man Cheong (PW6) was from Permas Jaya on the way to Jalan Serampang. He was then with his friend, Yau Wei Hong. He had known Yau Wei Hong since his childhood days. Both of them wanted to go to the Guest Pub to have drinks. They arrived at the Pub at slightly past midnight. There, PW6 met several friends, namely Lee Kar Ho, Chan Ying Siong (PW5) and 4 or 5 others whose names he did not know. PW6 was in that Pub until about 1am. After that, PW6 went to the Sanctum Disco together with Yau Wei Hong. On arrival at the Disco at around 2am, PW6 looked for his friends and sat with them and had drinks together with them. At around 3am, PW6 was informed by his friend, Ah Tee who was subsequently identified as Tan Lay Fatt that Au Yoke Kong who was PW6's childhood friend had been assaulted at a Food Court. Upon hearing this, PW6 went to the Food Court located adjacent to the Disco together with Ah Tee and Yau Wei Hong. At the Food Court, PW6 saw Au Yoke Kong seating on a chair at a table together with seven or eight persons. PW6 could see that Au Yoke Kong's face was bleeding. PW6 heard Yau Wei Hong asking the men seating there who actually had assaulted Au Yoke Kong and one of the men answered that they were the one who had assaulted Au Yoke Kong. Subsequently, a fight ensued and Yau Wei Hong who had put his hand on the shoulder of one of the men was stabbed in the stomach by a knife. PW6 witnessed this and he identified the 1st accused as the person who had stabbed Yau Wei Hong. After Yau Wei Hong was stabbed, PW6 went to his aid. After that, the others from the group of seven or eight persons attacked PW6 and Ah Tee. Then, about ten or more other persons

came and straightaway attacked PW6 and Ah Tee. PW6 then ran in the direction of the New York Hotel. During the fight, PW6 saw Au Yoke Kong at the back of the Food Court being stabbed on the head by a knife. PW6 identified the 2nd accused as the person stabbing Au Yoke Kong at the time. PW6 said that at that time nobody else was stabbing Au Yoke Kong. PW6 also identified the 2nd accused as one of the seven or eight persons who was sitting together with Au Yoke Kong initially. At that time, PW6 also saw Ah Tee fighting with the 1st accused in which PW6 saw the 1st accused stabbing Ah Tee in the stomach with the knife. PW6 was also injured in the fight and was warded in the hospital.

**[3]** Dr. Shaidan Md Noor (PW1) was the Pathologist who had performed the post mortem and the relevant post mortem reports were marked as exhs. P6, P7 and P8. P6 was in respect of the deceased known as Tan Lay Fatt and the cause of death was given as due to chest injuries due to stab wounds. P7 was in respect of the deceased known as Au Yoke Kong and the cause of death was given as due to chest injuries due to stab wounds. P8 was in respect of the deceased known as Yau Wei Hong and the cause of death was given as due to chest and abdominal injuries due to stab wounds.

**[4]** The aforesaid is a summary of the case for the prosecution upon which each ingredient of the three charges must be established in order to make out a *prima facie* case against both the accused.

**[5]** Section 180(1) of the Criminal Procedure Code (the CPC) says that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused. If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal. If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter his defence.

**[6]** In the present case in order to make out a *prima facie* case, the prosecution must establish the essential ingredients as follows:

a. The death of three human beings;

b. The deceased persons died as a result of injuries sustained;

c. The injuries of the deceased persons were caused, or the result of the act of the accused persons;

A d. In inflicting the injuries upon the deceased persons, the accused persons either -

(i) Caused them with the intention of causing death; or

B (ii) Caused them with the intention of causing such bodily injuries as the accused persons knew to be likely to cause death; or

(iii) Caused them with the intention of causing bodily injuries and such injuries were sufficient in the ordinary cause of nature C to cause death.

**[7]** It is also to be noted that the three charges against both the accused persons are brought in reliance on the common intention provisions of s. 34 of the Code jointly with other persons who are still at large.

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**[8]** Case law authorities state that under s. 180 of the CPC the court is required to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his defence and it involves an assessment of the credibility of the E witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. This principle was shown in a number of cases. I would only draw attention to the decision of our Federal Court in *PP v. Mohd. Radzi bin Abu Bakar* [2006] 1 CLJ 457 where Gopal Sri Ram JCA said:

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> After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has bee made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call G on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See, *Tai Chai* H *Keh v. Public Prosecutor* [1948] 1 LNS 122; [1948-49] MLJ Supp 105; *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 LNS 116; [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the I accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It

> is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [19831 CLJ 101 (Rep); [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

**[9]** In the present case, the prosecution relies a great deal on the testimony of PW6 to establish that the fatal injuries sustained by the three victims were as a result of the act of both the accused persons. He was the only eye-witness evidence at the scene of the incident against both the accused persons. Therefore, the central question in this case is whether PW6 is a reliable and a witness of truth. In considering this fundamental issue, I have kept in the forefront of my mind the well-known principle that contradictions and discrepancies or even demonstrable falsehoods in the evidence of a witness are not sufficient reason for rejecting the whole of the evidence of such witness (see: *De Silva v. Public Prosecutor* [1964] MLJ 81, *Mohamed Alias v. Public Prosecutor* [1983] 2 MLJ 173, *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105 and *Mohamed Kasdi v. Public Prosecutor* [1969] 1 MLJ 135). The proper approach is to treat the evidence with suspicion and to treat it with caution and accept parts of the witness' evidence, which the court considers the evidence as true. On the other hand, if the court considers the evidence utterly unreliable it is to be disregarded completely. In *Pie bin Chin v. Public Prosecutor* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 Wan Yahya J (as he then was) said:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

**[10]** Turning now to the testimony of PW6. In this regard, En. Ian Sheng Kuan Chou Chuen, the learned deputy public prosecutor fairly conceded in his submission that there were discrepancies and inconsistencies in the evidence of PW6. Nonetheless, he argued that those infirmities were natural and might pointed in favour of PW6's truthfulness. The learned deputy urged me to accept PW6 as a witness of truth because, as he argued, the contradictions did not affect the reliability of PW6's evidence of identification.

**[11]** Now, PW6's evidence in examination-in-chief, in substance, are as follows. Firstly, he identified the 1st accused as the one who had stabbed Yau Wei Hong. He did not see clearly how many times Yau Mei Hong had been stabbed. He was about 15 feet away when Yau Wei Hong was stabbed. Secondly, he identified the 2nd accused as the person who had stabbed Au Yoke Kong on the head. He did not see clearly how many times the 2nd accused had stabbed Au Yoke Kong. He only saw the 2nd accused alone stabbing Au Yoke Kong. Thirdly, he identified the lst accused as the one who had stabbed Ah Tee in the stomach with a knife. He also did not see clearly how many times the 1st accused had stabbed Ah Tee.

**[12]** Yet, in cross-examination by En. Gobind Singh, learned counsel for the lst accused, PW6 admitted that he could not recall the description of the person who had stabbed Yau Wei Hong, Au Yoke Kong and Ah Tee. His exact words are as follows:

> Pada hari ini saya tidak ingat descripisi orang yang menikam Au, Ah Tee dan Yau.

**[13]** On that critical aspect, PW6 in re-examination by the learned deputy public prosecutor gave explanation that he could not give a description of the person who had stabbed Yau Wei Hong, Au Yoke Kong and Ah Tee since that incident had taken place a long time ago and he disclosed he could not remember well. PW6 gave no explanation as to why that during examination-in-chief he could identify both the accused persons as the two assailants. In my view, the veracity of PW6 is brought into question because of his own admission in cross-examination that he could not recall the description of the stabbers of Yau Wei Hong, Au Yoke Kong and Ah. Therefore, to my mind, it is not safe to believe PW6 as a truthful witness when he testified and identified during examination-in-chief that the 1st accused as the one who had stabbed Yau Wei Hong and Ah Tee and that the 2nd accused was the person who has stabbed Au Yoke Kong.

**[14]** What's more on this aspect of PW6's evidence, the investigating officer of this case, Chief Inspector Dzulkhairi b Mukhtar (PW7) in his testimony said that a few days after the incident PW6 was taken to the Police Headquarters, Johore, so as to facilitate the police to carry out a "photo fit" of suspects. According to PW7, PW6 had told him that he could remember the face of one suspect only. PW6 also informed PW7 that the suspect was aged in his forties and the suspect was "berbadan gempal dan rendah". In cross-examination by En. RK Menon, learned counsel for the 2nd accused, PW7 also confirmed that the "photo fit" prepared by Corporal Shariff in pursuance of the details given by PW6 could not be used for identification purposes. PW7 also confirmed that PW6 had told him that he could identify only one assailant namely, the one who had attacked Ah Tee. In my view, it is unnatural and indeed incredible for PW6 to have said in court, almost four years after the incident, that he saw the 1st accused stabbed Yau Wei Hong and Ah Tee and that the 2nd accused stabbed Au Yoke Kong. Yet, very soon after that incident he told the police he could only remember the face of one stabber. In the light of this unsatisfactory feature in his evidence, it would require a very strong explanation to accept PW6 as a credible and reliable witness. PW6 gave no explanation as to why he could now identify the two assailants of the three victims. If indeed it was true that PW6, as in his examination-in-chief, saw the lst accused and the 2nd accused stabbed the victims, by the natural course of human conduct he would inform the investigating officer that he could remember the face of the two assailants. For that reason, in my view his story implicating the first accused and the 2nd accused is inherently improbable and unreliable by reason of him informing the investigating officer that he could remember the face of one assailant only.

**[15]** Furthermore, his evidence as regards what transpired at the scene where the fighting took place is also unconvincing. It was in his testimony that he did not know how long the stabbing occurrences took place. If indeed he actually saw the incidents, he would certainly know. When look in this way, one can see that it is doubtful whether PW6 in point of fact saw the incident at all. It was also in his testimony that he heard Yau Wei Hong asking the seven or eight persons seating at the Food Court who actually had assaulted Au Yoke Kong and one of the men answered that they were the one who had assaulted Au Yoke Kong. According to PW6, he could not identify the person who had given that answer. How then he could remember the face of the 1st accused and the 2nd accused out of about 18 persons at the scene of the fighting whom he saw only for a short time and in the midst of pandemonium? PW6's mental condition at that point in time would certainly have left much to be desired. By his own admission, he was

slightly drunk. He approached to a table where he saw his friend, Au Yoke Kong bleeding from the face. According to him a sudden fight erupted wherein he and the others were attacked. He was unable to identify his own assailant. The whole incident could have been over within a matter of minutes. In such a state of affairs, it would be most doubtful for PW6 to be able to give attention to what was happening to his friends. Therefore, having regard to the situation prevailing at that material time, it would not be entirely safe to accept the evidence of PW6, whose evidence is the only evidence that implicates both the accused persons, as regard to the identity of both the accused as being the persons who caused the fatal injuries.

**[16]** As to the testimony of PW6, I have compared his evidence in examination-in-chief, cross-examination and re-examination. In my view, the discrepancies and inconsistencies are so irreconcilable and ambivalent that renders his credibility doubtful and highly questionable. Even though his evidence could raise a suspicion that both the accused persons had inflicted the fatal injuries but suspicion alone cannot be the basis of a conviction. In the circumstances, the inference most favourable to both the accused must be adopted. In this regard, His Lordship Augustine Paul JCA (as he then was) speaking for the Federal Court in the case of *Balachandran v. PP* [2005] 1 CLJ 85 reminded us on the standard of proof at the close of the case for the prosecution. His Lordship statement of the law is at p. 98:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

**[17]** Now I come to a different point. The important point to note here is that, as I have said earlier, the charges against both the accused were brought in reliance on the common intention provisions of s. 34 of the Code jointly with other persons who are still at large. Section 34 says:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

**[18]** On a charge involving common intention, the prosecution has to show that there was a pre-arranged plan to commit a criminal act and the crime forming the subject of the charge was done in concert

pursuant to that pre-arranged plan. (see: Mallal's *Penal Law*, para 34.3, *Namasiyiam & Ors v. Public Prosecutor* [1987] 2 MLJ 336, *Mahbuh Shah v. King Emperor* [1945] AIR PC 118, and *Public Prosecutor v. Krishna Rao a/l Gurumurthi & Ors* [2000] 1 CLJ 446 HC). It is not easy to prove common intention by direct evidence. That is why common intention can be inferred from the facts and circumstances of a particular case and from the conduct of the persons involved. But in the present case, the facts and circumstances taken together do not support the conclusion that both the accused persons and the other persons who are still at large were acting in concert pursuant to a pre-arranged plan in causing the death of Yau Wei Hong, Au Yoke Kong and Ah Tee. There is no evidence adduced by the prosecution to prove that there existed a common intention between both the accused and the persons who are still at large to commit the crime of murder in the present case. Furthermore, no inference of common intention cannot be inferred from the facts and circumstances of this case. In my view, something more happened that material time concerning the clash which led to the death of Yau Wei Hong, Au Yoke Kong and Ah Tee that was not related by PW6, which could throw some light on the issue of common intention.

**[19]** Having regard to the totality of the entire evidence, I find that there is a serious doubt as to reliability and credibility of the evidence of PW6 in implicating both the accused in the incident. Thus, I find that the prosecution has not made out a *prima facie* case against both the accused persons. Accordingly, I acquit and discharge both the 1st accused and the 2nd accused without calling upon them to enter their defence.